

1 have heard here.

2 JUDGE CHACHKIN: So at or about the time Judge  
3 Marcus rendered his decision, was it after Judge Marcus's  
4 decision that you came to the conclusion that it was now  
5 viable to operate a sixth station in the market?

6 THE WITNESS: I don't recall exactly when I  
7 learned about Nielsen's desire to put meters into the  
8 Orlando market, but it was about that time, sir. And the  
9 economic situation, things were beginning to look better for  
10 1992; yes, sir, they were.

11 JUDGE CHACHKIN: This is mid 1991?

12 THE WITNESS: Right. In mid 1991, you already  
13 started getting a picture for 1992 and things were beginning  
14 to look better. There was also talk about a possible new  
15 network in the near future. Things were beginning to brew  
16 in a positive sense in the television industry.

17 JUDGE CHACHKIN: And when did you learn that  
18 Nielsen was going to put meters into the market?

19 THE WITNESS: Again, it's around that June 1991.  
20 I cannot tell you specifically. I have said here that it  
21 was May - June. I cannot pin it down, but it's around that  
22 time, sir.

23 JUDGE CHACHKIN: And the fact that you lost the  
24 preliminary injunction was not the reason why you decided to  
25 go ahead with construction?

1 THE WITNESS: No, sir. No. I began to see long-  
2 term viability in the station that I had not seen seven  
3 months earlier.

4 And, again, it took a lot more money. You know,  
5 it was not an easy call, but it has a light at the end of  
6 the tunnel, seven months later when things are beginning to  
7 change, and especially the meters. The meters had been a  
8 huge change that developed around that mid 1991 time frame.

9 JUDGE CHACHKIN: All right.

10 Any further questions of this witness?

11 MR. COLE: Your Honor, may I just --

12 MS. POLIVY: Yes, sir.

13 I thought he had his chance.

14 JUDGE CHACHKIN: Based on what I --

15 MR. COLE: One question.

16 RECROSS-EXAMINATION

17 BY MR. COLE:

18 Q Mr. Rey, do you know when -- did Nielsen  
19 ultimately meter the Orlando market?

20 A Yes, it did.

21 Q Do you know when that occurred?

22 A I am not really sure. It was either late '92 or  
23 early '93. I know it takes them a good year to set up a  
24 metered market. It's in that time frame, late '92, early  
25 '93. Sometime in there, I believe, is when they started.

1 MR. COLE: Thank you.

2 JUDGE CHACHKIN: Ms. Polivy.

3 FURTHER REDIRECT EXAMINATION

4 BY MS. POLIVY:

5 Q Mr. Rey, would you have gone ahead with  
6 construction if Fainbow had won the preliminary injunction?

7 MR. COLE: Objection. Irrelevant.

8 MS. POLIVY: Same question.

9 MR. SILBERMAN: I agree, Your Honor. That wasn't  
10 based on what you asked.

11 MS. POLIVY: Is there anything that you don't want  
12 in the record or you do want in the record, Mr. Silberman?  
13 An impartial record?

14 JUDGE CHACHKIN: All right, I will permit the  
15 question.

16 Go ahead. Answer the question.

17 THE WITNESS: Yes.

18 BY MS. POLIVY:

19 Q Did the preliminary injunction have anything to do  
20 with your going ahead with construction except insofar as it  
21 applied to the landlord?

22 A I don't understand the question.

23 Q Did the preliminary injunction, grant or denial,  
24 have --

25 A You're talking about the proceeding?

1 Q Well, the fact that -- the outcome of the  
2 preliminary injunction, did that have anything to do with  
3 your decision to go ahead or not go ahead?

4 A No. By that time I thought there was light at the  
5 end of the tunnel, as I said earlier.

6 Q You settled the lawsuit, the tower suit with  
7 Gannett, correct?

8 A Yes, I did.

9 Q What reasons did you have for settling that suit?

10 MR. COLE: Objection. Irrelevant.

11 JUDGE CHACHKIN: I will permit it. Overruled.

12 THE WITNESS: I wanted to concentrate on a  
13 television, the construction and operation. That's what I  
14 wanted to do since 1982. My contract unprohibited --  
15 talking amount of money, but I guess if the judge asked me,  
16 I can tell you. But, you know, it was a large amount of  
17 money, but it's not the money per se. It's the fact that I  
18 wanted to concentrate on things. Lawsuits take a lot of  
19 energy, time. I don't think I could have litigated that and  
20 concentrated on building the station.

21 I mean, I was putting in 70 hours a week to  
22 construct the station. I -- you know, that's the answer.

23 BY MS POLIVY:

24 Q Without going into the figures, you said there was  
25 a lot of money. What did you mean?

1 JUDGE CHACHKIN: Well, do you really want to get  
2 into the settlement and the --

3 MS. POLIVY: No, Your Honor. I have one question.

4 JUDGE CHACHKIN: I think we should --

5 BY MS. POLIVY:

6 Q Who paid who?

7 A I'm sorry?

8 Q The settlement, who paid who?

9 A The landlord paid Rainbow a substantial amount of  
10 money in exchange for Rainbow allowing or giving the consent  
11 finally that it had denied since 1988, giving finally the  
12 consent to allow another antenna on the same 1500 foot  
13 aperture. That's what Rainbow sold in the settlement, if  
14 you will.

15 MS. POLIVY: I have no further questions.

16 JUDGE CHACHKIN: You are excused. Thank you.

17 THE WITNESS: Thank you.

18 (Witness excused.)

19 MS. POLIVY: Your Honor, I have one other --

20 JUDGE CHACHKIN: All right.

21 MS. POLIVY: -- exhibit that I would like to.

22 JUDGE CHACHKIN: Let's see it.

23 MS. POLIVY: I am handing a six-page document

24 which is entitled "The United States Court of Appeals,  
25 District of Columbia Circuit, Brief for Appellee" be marked

1 for identification as Rainbow Exhibit 12.

2 JUDGE CHACHKIN: The document will be so marked.

3 (The document referred to was  
4 marked for identification as  
5 Rainbow Exhibit No. 12.)

6 MS. POLIVY: Your Honor, this six-page document is  
7 an excerpt of one argument from the brief of the Commission  
8 to the United States Court of Appeals in this proceeding  
9 which directly addresses the issues in this proceeding.

10 I'm sorry I didn't put the cover page but it's red  
11 and it does not copy. But for any parties that would like  
12 to examine it, I have the full brief here.

13 Precisely the matters raised here go both to the  
14 financial qualifications issues, the alleged  
15 misrepresentation, and the tower representations with  
16 respect to the fifth extension of time.

17 I ask that official notice be taken of this, and  
18 be admitted as Rainbow Exhibit 12.

19 JUDGE CHACHKIN: I guess, Ms. Polivy, that there  
20 is really no need for a hearing. We should have rested at  
21 this point and not taken any evidence since we do have the  
22 brief of the Commission saying -- argument to the Court. But  
23 we did hold a hearing. The Court did remand it. The  
24 Commission did require a hearing to be held, and we have  
25 taken evidence. Presumably the issues will be decided on

1 the basis of evidence, not on the basis of a brief which was  
2 filed to the Court, which the Court rejected.

3 MS. POLIVY: Well, Your Honor --

4 JUDGE CHACHKIN: I don't see how this could  
5 possibly be relevant to anything.

6 MS. POLIVY: The Court did not reject --

7 JUDGE CHACHKIN: Well, remanded it, and we have  
8 had a hearing --

9 MS. POLIVY: It was remanded on certain elements.

10 JUDGE CHACHKIN: And we have had a hearing and we  
11 have taken evidence, and obviously --

12 MS. POLIVY: Your Honor.

13 JUDGE CHACHKIN: -- a decision will be based on  
14 the evidence, not on the Commission's brief.

15 MS. POLIVY: Your Honor, are you going to suggest  
16 to me that the Commission's position, which appears in the  
17 joint appendix, or in the memorandum of opinion and order,  
18 which states the Commission's view of the law, would not be  
19 controlling in this proceeding?

20 MR. SILBERMAN: And, Your Honor, may I just had we  
21 have in the joint hearing exhibits the Commission's order  
22 that was reversed by the Court of Appeals? That's Joint  
23 Hearing Exhibit No. 10, I believe.

24 There the Commission's reasons are laid out. It  
25 was offered for the purpose of establishing that the

1 Commission had granted the assignment, or the extension and  
2 the assignment application, and this proves nothing.

3 MS. POLIVY: Well, this simply states the  
4 Commission's position.

5 JUDGE CHACKIN: This not the first time that the  
6 Commission's opinion has been reversed. The Court of  
7 Appeals has reversed the Commission and remanded it for a  
8 hearing. That's what we have held a hearing on, to decide  
9 the issues, not base it on the fact --

10 MS. POLIVY: Your Honor, we are entitled to show  
11 that the Commission's --

12 JUDGE CHACKIN: No, you don't. It's totally  
13 irrelevant what position the Commission took in the court.

14 MR. SILBERMAN: And, Your Honor, may I just add  
15 here for the record this is the Commission's counsel arguing  
16 a case based on a decision that the Commission had reached,  
17 which is already in this record.

18 JUDGE CHACKIN: Press Exhibit 12 is rejected as  
19 irrelevant.

20 MR. COLE: That would be Rainbow Exhibit 12.

21 JUDGE CHACKIN: I mean, Rainbow Exhibit 12 is  
22 rejected as irrelevant.

23 (The document referred to,  
24 having been previously marked  
25 for identification as Rainbow



1 Exhibit No. 12, was rejected  
2 for admission.)

3 MR. COLE: Thank you, Your Honor.

4 JUDGE CHACHKIN: I assume Rainbow has now  
5 completed its direct case?

6 MR. EISEN: Yes, Your Honor.

7 JUDGE CHACHKIN: All right. We were talking about  
8 rebuttal.

9 Where do we stand on that?

10 MR. COLE: Your Honor, I served a subpoena to Mr.  
11 Gordon -- Mr. Gordon's counsel, who has agreed to accept  
12 service. He has advised me again that Mr. Gordon is in  
13 Japan, apparently traveling, and will be back on the  
14 country, according to Mr. Iraola, on July 8.

15 I wanted to discuss with Your Honor and the  
16 parties what would be a good time before I got back to Mr.  
17 Iraola. I would propose to hear Mr. Gordon one day of  
18 getting back eliminating jet lag, and try to schedule in for  
19 July 10, if we could.

20 JUDGE CHACHKIN: What date is that?

21 MR. COLE: That would be a Wednesday, I believe,  
22 subject to check. I don't have my calendar with me this  
23 morning.

24 MR. SILBERMAN: It should be because the 4th is a  
25 Thursday.

1 MR. EISEN: The 10th is a Wednesday.

2 MR. COLE: Yes.

3 MR. SILBERMAN: The 10th of July?

4 JUDGE CHACHKIN: Does anyone have a problem with  
5 July 10th for the testimony of Mr. Gordon?

6 MR. EISEN: I do, Your Honor.

7 JUDGE CHACHKIN: I would like it to be the 11th.

8 JUDGE CHACHKIN: All right, it will be the 11th.

9 MS. POLIVY: It will not take a full day, will it?

10 MR. COLE: Oh, no. It won't take more than  
11 probably about an hour and a half.

12 MS. POLIVY: Okay, because I have a court date on  
13 the 12th.

14 JUDGE CHACHKIN: All right, we will schedule Mr.  
15 Gordon for July 11th. We can make it at 9 a.m. to make sure  
16 we are finished.

17 MR. COLE: I will contact Mr. Iraola this  
18 afternoon and let him know.

19 JUDGE CHACHKIN: Now, you said you had some other  
20 matters you wanted to offer.

21 MR. COLE: Well, I have the transcript of the  
22 depositions of Mr. Stewart, Mr. Pendarvis, and Ms. Kreisman.  
23 I am happy to put all my rebuttal evidence in on July 11, or  
24 I would be happy to offer those three depositions right now,  
25 whichever Your Honor wishes.

1 JUDGE CHACHKIN: Well, Rainbow said they would  
2 prefer that we go ahead with rebuttal.

3 MS. POLIVY: We don't care. If it's documents,  
4 Your Honor, we don't care as long as we know what they are.

5 JUDGE CHACHKIN: Anything else besides documents  
6 and Mr. Gordon?

7 MR. COLE: No, no other testimonial evidence at  
8 this point, Your Honor.

9 JUDGE CHACHKIN: Mr. Silberman?

10 MS. POLIVY: Are there any other documents?

11 MR. SILBERMAN: Your Honor. Oh, I'm sorry.

12 MR. COLE: No, the only other document I mentioned  
13 before, I believe, was the interrogatory answers of Mr.  
14 Sandifer.

15 MS. POLIVY: Well, Your Honor, we would object to  
16 the interrogatories of Mr. Sandifer unless he is produced  
17 for cross-examination. And according to the interrogatories  
18 of Mr. Sandifer, he based his decision on the nature of the  
19 proceeding on consultation with Mr. Gordon. So unless we  
20 are allowed to examine --

21 JUDGE CHACHKIN: I don't know what interrogatories  
22 there are.

23 MS. POLIVY: Mr. Sandifer --

24 JUDGE CHACHKIN: I don't want to get into  
25 something I haven't seen it.

1 Do you want to argue it today or put it off?

2 That's the only question I have.

3 MR. COLE: My inclination would be to do it -- I  
4 would rather do all my rebuttal on July 11. I don't think  
5 it will take substantially longer than it is to do Mr.  
6 Gordon.

7 JUDGE CHACKIN: Now, you are going to object to  
8 the deposition of the Commission staff?

9 MS. POLIVY: No.

10 JUDGE CHACKIN: All right. All right, in that  
11 case all you are going to be disputing apparently is Mr.  
12 Sandifer's --

13 MR. SILBERMAN: I have one further matter, Your  
14 Honor.

15 JUDGE CHACKIN: Go ahead.

16 MR. SILBERMAN: We had not until a few days ago  
17 intended to introduce or offer rebuttal evidence, but we  
18 would propose to introduce into evidence in rebuttal  
19 portions of what was identified as Rainbow Exhibit 2, which  
20 was objected to its entirety on June 26 by Your Honor.  
21 That's the -- specifically the affidavit of Roy Stewart.

22 JUDGE CHACKIN: Rainbow Exhibit 2?

23 MR. SILBERMAN: Yes, Exhibit 2, page 15 of Rainbow  
24 Broadcasting Company, Limited. It was a joint hearing  
25 exhibit of the Rainbows, if you will.

1 JUDGE CHACHKIN: Page 15?

2 MR. SILBERMAN: Yes, page 15.

3 And what I would propose to offer into evidence  
4 are the following: Paragraph one, sentences one and two;  
5 and paragraph two.

6 JUDGE CHACHKIN: Paragraph one, sentences one and  
7 two you said?

8 MR. SILBERMAN: Yes. And the rest of it,  
9 paragraph one, sentences one and two; and then the entire  
10 paragraph number two.

11 That's the only thing we would offer into  
12 evidence, and I believe -- we believe it would make for a  
13 complete record because, as Your Honor will recall, Ms. Tony  
14 Cook Bush did testify to this conversation, and this  
15 provides the other half of the testimony of the other  
16 participant in that conversation, his recollection.

17 Now, we are also aware that this is consistent  
18 with the statement that Mr. Stewart made to the Inspector  
19 General, and we believe it is relevant.

20 I tried, and asked if counsel for the Rainbows  
21 would stipulate to this, and they declined to do so, and I  
22 can't force them to stipulate.

23 And I don't think under the circumstances that we  
24 should have to bother calling Mr. Stewart to testify on this  
25 very limited matter. It's for the purpose of establishing

1 what Roy Stewart recall happened during this conversation.

2 JUDGE CHACHKIN: Well, we have his deposition, and  
3 I assume this subject was covered.

4 MR. SILBERMAN: No, it was not covered. I reread  
5 the deposition. And the reason we didn't ask the question  
6 is we already knew what the answer was based on the evidence  
7 that had been, or the information that had been accumulated  
8 in the joint appendix in the Press v FCC case.

9 And I would point out to, Your Honor, that both  
10 the Commission and the Court of Appeals in their decisions  
11 in this matter which led to the Court of Appeals remand did  
12 rely on the record that was made thus far during that Press  
13 Broadcasting proceeding.

14 And now we have an evidentiary hearing. We  
15 believe, to make the record full and complete, that Mr.  
16 Stewart's statement should go in. And since the Rainbows  
17 have offered this into evidence without a supporting --  
18 sponsoring witness, we believe that it's not necessary for  
19 him to be cross-examined about this very limited matter.

20 JUDGE CHACHKIN: Well, let's see the views of the  
21 parties.

22 Mr. Cole?

23 MR. COLE: I have no objection to that, Your  
24 Honor.

25 JUDGE CHACHKIN: Ms. Polivy?

1 MS. POLIVY: Your Honor, we would like to cross-  
2 examine Mr. Stewart.

3 MR. EISEN: I cannot imagine that the cross-  
4 examination would be extensive. It's only on one fairly  
5 small point, Your Honor, a paragraph that there is some  
6 conflict in the testimony. Ms. Cook Bush was here to  
7 testify on that point, and I think Mr. Stewart should be  
8 inconvenienced, even just for --

9 JUDGE CHACHKIN: I think Ms. Cook testified she  
10 didn't deny it's possible she might have brought up --

11 MS. POLIVY: No, might Stewart might not deny this  
12 either.

13 JUDGE CHACHKIN: So there is really no conflict.  
14 She doesn't remember, but she says it might have been  
15 possible that she discussed that.

16 MS. POLIVY: Well, we would certainly like to  
17 cross-examine Mr. Stewart.

18 JUDGE CHACHKIN: All right. In view of that, I  
19 will not receive the portion of the affidavit then.

20 MR. SILBERMAN: Okay.

21 JUDGE CHACHKIN: And my ruling will stand as  
22 rejected.

23 MR. SILBERMAN: I am going to get into that. We  
24 are going to offer that into evidence, so there is no  
25 surprise or trial by --

1 MR. EISEN: And you can be certain --

2 MR. COLE: And we can do that on --

3 MR. SILBERMAN: I am going to see his  
4 availability. I have to speak to his counsel.

5 MS. POLIVY: Why don't you try to coordinate Mr.  
6 Gordon and Mr. Stewart the same day?

7 JUDGE CHACHKIN: Let us do it first since --

8 MR. SILBERMAN: There is some indications that he  
9 may not be available, but I will do that as soon as we -

10 MS. POLIVY: Well, Your Honor, if they are both  
11 not available on the 11th, then we --

12 JUDGE CHACHKIN: Well, we know someone is  
13 available on the 11th.

14 MS. POLIVY: Well, I was just going to suggest  
15 that we get a date that they are both available on, then  
16 counsel can come back to you.

17 JUDGE CHACHKIN: Well, right now tentatively I am  
18 going to set July 11th.

19 MS. POLIVY: That's fine.

20 JUDGE CHACHKIN: But you can --

21 MR. SILBERMAN: I will contact his counsel.

22 MS. POLIVY: And rather than just -- it could be  
23 in two days.

24 JUDGE CHACHKIN: All right, we will be in recess  
25 until July 11th unless we change the date.



1 MR. SILBERMAN: Thank you, Your Honor.

2 MR. COLE: Thank you, Your Honor.

3 MR. EISEN: Thank you, Your Honor.

4 (Whereupon, at 10:13 a.m., the hearing was  
5 recessed, to reconvene at 9:00 a.m., on Thursday, July 11,  
6 1996.)

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**REPORTER'S CERTIFICATE**

**FCC DOCKET NO.:** 95-172  
**CASE TITLE:** RAINBOW BROADCASTING COMPANY  
**HEARING DATE:** June 28, 1996  
**LOCATION:** Washington, D. C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

Date: 6/28/96

Gary A. Sabel  
Official Reporter  
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Gary A. Sabel

**TRANSCRIBER'S CERTIFICATE**

I hereby certify that the proceedings and evidence were fully and accurately transcribed from the tapes and notes provided by the above named reporter in the above case before the Federal Communications Commission.

Date: 7/5/96

Joyce F. Boe  
Official Transcriber  
Heritage Reporting Corporation  
Joyce F. Boe

**PROOFREADER'S CERTIFICATE**

I hereby certify that the transcript of the proceedings and evidence in the above referenced case that was held before the Federal Communications Commission was proofread on the date specified below.

Date: 7/8/96

Barbara A. Blossom  
Official Proofreader  
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